

EXHIBIT B

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LOANS INC.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

AMANDA HILL and GAYLE HYDE,
individually and on Behalf of All Others
Similarly Situated,

Plaintiffs,

V.

QUICKEN LOANS INC.

Defendant.

Case No. 5:19-cv-00163-FMO-SP

**REBUTTAL TESTIMONY OF
PHILIP GREENSPUN, Ph.D.
PURSUANT TO MAY 11, 2020
ORDER**

Ctrm.: 6-D

Judge: Hon. Fernando M. Olguin

1 **REBUTTAL TESTIMONY OF PHILIP GREENSPUN, Ph.D.**

2 I, Philip Greenspun, declare and testify under oath as follows:

3 1. Pursuant to the Court’s May 11, 2020 Order (ECF No. 99), I submit this
4 Rebuttal Testimony in support of Quicken Loans’ Motion to Compel Arbitration
5 (ECF No. 29), and in response to the April 7, 2020 Declaration of Alexander Young
6 submitted by Plaintiff Amanda Hill (ECF No. 94) (the “Young Declaration”). I
7 previously submitted direct testimony by declaration in this matter on April 7, 2020
8 (ECF No. 93) (the “Greenspun Declaration”), which attached my rebuttal report
9 (ECF No. 93, Ex. B) (the “Greenspun Report”). If called as a witness in this action,
10 I could and would testify competently as to matters set forth herein.

11 2. Pursuant to the Court’s May 11, 2020 Order (ECF No. 99), my rebuttal
12 testimony below responds to paragraphs 44-46, 51, 66-71, 72-81 and Exhibits T-Z
13 and AA-BB of the Young Declaration.

14 A. **The Evidence Does Not Support Mr. Young’s Testimony About Where**
15 **Ms. Hill Directed Her Eyes on the LMB.YourVASurvey.Info Website.**

16 3. In his Declaration, Mr. Young opines (without citation) that when
17 visiting LMB.YourVASurvey.info, an “average site visitor” “would have his or her
18 eyes where they would have just been entering text into the form.” Young
19 Declaration ¶ 45. Assuming Hill is such an “average site visitor,” he then concludes
20 that for the period of time that Hill viewed the LMB.YourVASurvey.info website on
21 October 10, 2018 (shown as Exhibit N to the Young Declaration), she directed her
22 eyes only “where the address is being selected” and then “move[d] her eyes to the
23 ‘change’ link” *Id.* Based on this assumption, Mr. Young further concludes that
24 the “[v]isibility of the Terms of Use link was far from obvious to Hill” and that “Hill
25 was not offered any reasonable opportunity to see the Terms of Use link and know
26 that she would be bound by the Terms of Use.” *Id.* ¶ 46.

27 4. Mr. Young cites no basis for his assumption that a site visitor such as
28 Ms. Hill would (or even could) confine her vision to the specific portion of the

1 webpage where there was a text field, and in doing so, ignore the remainder of the
2 webpage. Nor is this assumption reasonable in my experience because Ms. Hill
3 viewed the webpage on a 5-inch screen on her mobile device. *See* Young Declaration
4 Ex. B. As several studies confirm, website visitors are likely to scroll up and down
5 on a webpage, including past the “call to action” (*i.e.*, a portion of the website where
6 they are required to type information or click a button) in order to view *other* parts
7 of the website.¹ *See* Greenspun Report ¶¶ 58-61; Greenspun Declaration ¶ 35. Based
8 on this research, my experience with web design and user experience, and my own
9 experience in viewing webpages on mobile devices, I also know that users—like any
10 individuals presented with content through a visual medium—have complete control
11 with respect to what to view (or ignore) on a webpage and how long to spend on a
12 webpage. And, because they do, Mr. Young’s opinion that a website visitor would
13 never see other portions of the webpage, which were indisputably visible on the
14 screen, cannot withstand scrutiny.

15 5. Moreover, as I explained in my opening testimony responding to Mr.
16 Young’s testimony that the Terms of Use hyperlink was not disclosed to Hill because
17 she chose to spend one second on the page view displayed in Young Exhibit N
18 (Greenspun Declaration ¶¶ 27-28), Hill’s own choices and actions in interacting with
19 the webpage (*e.g.*, time spent, where to direct her eyes, where not to direct her eyes,
20 what to ignore, etc.) do not (and cannot) bear upon the question of whether the Terms
21 and Conditions (including the Terms of Use link) were disclosed and available to her.
22 To reuse the analogy from my opening testimony, it would be illogical to conclude
23

24 ¹ *See, e.g.*, <https://techcrunch.com/2017/05/02/google-will-now-allow-300x250-ads-above-the-fold-onmobile-webpages-says-they-can-be-user-friendly/> (Google revised its advertisement placement policies after research confirmed that advertisements placed “below the fold”—*i.e.*, in a position requiring scrolling by the user—still achieved a 50% viewability rate);
25 <https://marketingexperiments.com/conversion-marketing/below-the-fold-boston-globe-test> (2012 comparison test analyzed whether viewers were more or less likely to reach the “call to action” button depending on whether the button was above or below text explaining the benefits of subscribing to the Boston Globe newspaper and found no difference, regardless of where the button was placed).

1 that a particular newspaper article was not disclosed to readers simply because the
2 article was below the fold on the front page and one particular reader made the
3 decision to not unfold the page.

4 6. Consistent with this, Mr. Young cites (and I am aware of) no study,
5 scientific method, or technical or other evidence supporting his assumption-based
6 opinion that Ms. Hill's eyes looked solely at the address field and the "change" link.
7 *See* Young Declaration ¶ 45. There is, for example, no information available in the
8 technical evidence concerning Ms. Hill's October 2018 visit to
9 LMB.YourVASurvey.info—e.g., the source code for the website or the
10 ActiveProspect and Jornaya video playbacks—that indicates where Ms. Hill actually
11 directed her vision at any point or that otherwise supports Mr. Young's assertion that
12 she only looked at one small spot on a 5-inch screen. The technical evidence
13 confirms, however, and Mr. Young acknowledges, that the Terms of Use link was
14 visible on Ms. Hill's phone when she visited the LMB.YourVASurvey.info website
15 (Young Declaration ¶ 43 & Ex. N), and that the surrounding Terms and Conditions
16 were visible to Ms. Hill for most of her two-minute-plus visit to the website (*id.* ¶ 43
17 & Exs. K-P). *See* Greenspun Report ¶¶ 33-46; Greenspun Declaration ¶¶ 23-35.
18 Given the technical evidence available, no expert can offer a reliable or credible
19 opinion regarding where Ms. Hill's eyes were focused.

20 7. In sum, Mr. Young's opinion that "Hill was not offered any reasonable
21 opportunity to see the Terms of Use link and know that she would be bound by the
22 Terms of Use" remains (a) unsupported by any study, scientific method, or technical
23 or other evidence, and (b) belied by Mr. Young's own demonstration that the Terms
24 and Conditions (including the Terms of Use hyperlink) were disclosed to Ms. Hill in
25 close proximity to the "See my results!" call to action button on the
26 LMB.YourVASurvey.info webpage in October 2018 such that she had every
27 opportunity to review them and know that she would be bound by them.

28

1 **B. Mr. Young's Standard for "Conspicuousness" Is Not Consistent With**
2 **Industry Standards.**

3 8. In his Declaration, Mr. Young opines that the question before him “is
4 not whether the Terms of Use link was on the Webpage or not, but whether it was
5 conspicuous enough for Hill to have been aware of it.” Young Declaration ¶ 46. He
6 then concludes that, because “Merriam-Webster defines conspicuous as ‘obvious to
7 the eye or mind,’” “[v]isibility of the Terms of Use link was far from obvious to Hill
8 [because] Hill was not offered any reasonable opportunity to see the Terms of Use
9 link and know that she would be bound by the Terms of Use.” *Id.*

10 9. While I do not offer any opinion about whether the Merriam-Webster
11 definition Mr. Young cites is the correct definition of “conspicuousness” for purposes
12 of the issues before the Court, it is my opinion that the LMB.YourVASurvey.info
13 Terms and Conditions more than satisfies that definition and that Mr. Young’s
14 contrary conclusion is flawed in several, material respects.

15 10. First, Mr. Young’s opinions concerning the “conspicuousness” of the
16 LMB.YourVASurvey.info Terms and Conditions are unreasonable and inconsistent.
17 Mr. Young opines that the objective standard for measuring “conspicuousness” is
18 whether the information (that is, the words on the webpage) was “obvious to the eye
19 or mind” to “the average site visitor.” *Id.* ¶ 45. But, in his first error and
20 inconsistency, Mr. Young concedes that the Terms and Conditions were visible on
21 Ms. Hill’s screen, and so were objectively “obvious to the eye.” In his second error
22 and inconsistency, he concludes that the Terms and Conditions on the site were not
23 conspicuous based solely on the amount of time Ms. Hill chose to spend on the view
24 of the webpage and where she supposedly would have looked during her time on that
25 page. But, but by Mr. Young’s own method, it is improper to measure whether the
26 terms on a website are “conspicuous” based on the particular interactions of a specific
27 user (Ms. Hill) rather than the average site visitor. And, as I explained above, Mr.
28 Young offers no basis to assume that the actions taken by Ms. Hill, or the amount of

1 time she spent in a particular view on the website, was representative of the “average”
2 visitor (even assuming there was a way to test individuals to determine if there is
3 such an “average” visitor). In this respect, his methodology and conclusion are
4 deeply flawed.

5 11. Second, Mr. Young offers no basis for his opinion that his supposed
6 “average” visitor would not have seen the website Terms and Conditions, including
7 the Terms of Use hyperlink. Indeed, generally-accepted principles of user interface
8 design require that, whenever possible, webpage designers make new webpages work
9 in the same way that prior, and industry-leading, webpages work. This principle
10 encourages predictable and consistent user experience across the Internet. This is
11 because “humans have a strong memory for where things are visually located on the
12 screen.”² Web designers “leverage this characteristic by reserving commonly used
13 locations for various graphical elements”³ See Greenspun Report ¶¶ 47-57.

14 12. The convention across the Internet, established in the 1990s, is that
15 terms and conditions are accessible at the bottom of a webpage. This is reinforced
16 by the design of market leaders’ websites across the Internet, many of which include
17 their terms and conditions at the bottom of the website and often on additional linked
18 pages (including, for example, Amazon, Facebook, Kelley Blue Book, Toyota, Ford,
19 Lexus, and Chrysler).⁴

20 13. The designers of LMB.YourVASurvey.info and LowerMyBills.com
21 placed the relevant website disclosure language (the section of the page that begins,
22 “By clicking the button above, you express...”) near the bottom of the page in close
23 proximity to call to action (“See my results!”) button. See, e.g., Young Declaration

24 ² <https://www.interaction-design.org/literature/article/principle-of-consistency-and-standards-in-user-interface-design>; see also Designing the User Interface, Sixth Edition by Shneiderman, et al. (describing “consistency,” including as to website layout, as one of the “Eight Golden Rules of Interface Design”).

25 ³ <https://www.interaction-design.org/literature/article/principle-of-consistency-and-standards-in-user-interface-design>.

26 ⁴ See Greenspun Declaration Ex. E.

1 Ex. N. As Mr. Young acknowledges (*id.* ¶ 44), this is consistent with the placement
2 of terms and conditions on market-leading websites. As the research referenced
3 above confirms, this is precisely because it is where the users would expect to see
4 similar Terms and Conditions consistent with well-established industry norms and
5 standards—norms and standards Mr. Young chooses to ignore in his testimony. *See*
6 Greenspun Report ¶¶ 47-65.

7 14. In my opinion based upon review of the available research and
8 experience and expertise in website user experience, the Terms and Conditions
9 (including the Terms of Use link) were visible to Ms. Hill and were in precisely the
10 location where a user would expect them to be located.

11 C. **The LMB.YourVASurvey.Info “Thank You” Page Did Not Employ Video**
12 **Playback Software in October 2018.**

13 15. Mr. Young opines that, based on his *April 2020* visit to
14 LMB.YourVASurvey.info, the ActiveProspect video playback service is present
15 (today) on both the web form and the separate “Thank You” page and results in two
16 separate video playbacks (one for the web form, and one for the “Thank You” page).
17 Young Declaration ¶ 81. He then concludes that the absence of a second “Thank
18 You” page video showing Ms. Hill’s visit to the site in *October 2018*, is “proof of
19 the lack of the button being clicked” by Ms. Hill. *Id.* However, based on my review
20 of the LMB.YourVASurvey.info website code as it existed in October of 2018 when
21 Ms. Hill visited the website, the ActiveProspect code was not present on the “Thank
22 You” page at that time. As a result, no ActiveProspect video of Ms. Hill’s visit to
23 the “Thank You” page would exist and Mr. Young’s conclusion that the absence of
24 such a video supports that Ms. Hill did not click the “See my results!” button is
25 factually wrong and contrary to the available technical evidence.

26 16. Mr. Young also admits that his new opinion on how the ActiveProspect
27 code functions is based on the “assum[ption] that the video would cease once the new
28 page is loaded and [] is visible on the video.” *Id.* ¶ 79 (emphasis added). Mr. Young’s

1 assumption, however, is wrong. As I previously testified (Greenspun Declaration
2 ¶ 20-22), LMB.YourVASurvey.info is a single-page application ***up to, but not***
3 ***including***, the “Thank You” page. When a user clicks the “See my results!” button,
4 the JavaScript accompanying the survey questions terminates, including the
5 ActiveProspect JavaScript running on the webpage. *Id.* The ActiveProspect video
6 would thus terminate prior to loading the “Thank You” page (and the “Thank You”
7 page would not appear in that video).

8 17. Based on the technical evidence, the absence of a video displaying the
9 “Thank You” page during Ms. Hill’s visit in October 2018 (because no video of that
10 page was ever created) has no bearing on whether Ms. Hill clicked the submission
11 button on LMB.YourVASurvey.info and the available technical evidence is that she
12 did.

13 **D. How the Jornaya Software Functioned on the Affordable-Health-**
14 **Insurance-Plans.org Website Says Nothing About How the Software**
Functioned on the LMB.YourVASurvey.info Website in October 2018.

15 18. Mr. Young opines that, based on his April 2020 visit to a completely
16 unrelated website (affordable-health-insurance-plans.org), “the Jornaya system
17 collected data for this site visit past the clicking of the ‘Submit’ button and that click
18 would therefore be visible in the video Jornaya would produce for that LeadID.”
19 Young Declaration ¶ 70. From this testimony, Mr. Young appears to suggest
20 (although does not explicitly state) that he believes in October 2018 the
21 LMB.YourVASurvey.info website should have functioned similarly, and that the
22 Jornaya video should have captured Ms. Hill’s visit to the “Thank You” page. *See*
23 *id.*

24 19. Mr. Young’s tour of websites from around the Internet as a way of
25 understanding the Jornaya software and service does not make sense. The behavior
26 of HTML and JavaScript rendered and interpreted by web browsers is deterministic
27 and Mr. Young has been provided with access to the code from 2018 and more recent
28 versions of the website at issue (*e.g.*, via the developer tools in Google Chrome and

1 other browsers). There is no reason to look at how Jornaya's JavaScript executes on
2 a ***different*** website to explain how Jornaya's JavaScript executed on a particular two-
3 page, multi-part form offered by LMB.YourVASurvey.info.

4 20. Mr. Young's comparison of the LMB.YourVASurvey.info Jornaya
5 video to the affordable-health-insurance-plans.org video is flawed for the same
6 reasons as is his comparison of the LMB.YourVASurvey.info Jornaya video to the
7 LowerMyBills.com Jornaya video. Greenspun Declaration ¶¶ 19-22. The Jornaya
8 video of Ms. Hill's visit to LowerMyBills.com included the "Thank You" page for
9 that website because LowerMyBills.com is a single-page application ***including*** the
10 "Thank You" page. *Id.* Similarly, the Jornaya video of Mr. Young's visit to
11 affordable-health-insurance-plans.org includes the "Thank You" page for that
12 website because affordable-health-insurance-plans.org is a single-page application
13 ***including*** the "Thank You" page. These both stand in contrast to the
14 LMB.YourVASurvey.info website—which is a single-page application ***excluding***
15 the "Thank You" page. This means that, on websites structured like
16 LowerMyBills.com and affordable-health-insurance-plans.org, the Jornaya
17 JavaScript continues to run after the visitor clicks the submission button and proceeds
18 to the "Thank You" page (resulting in a video that includes the "Thank You" page).
19 On LMB.YourVASurvey.info, however, the Jornaya JavaScript terminates when the
20 visitor clicks the submission button and before he or she proceeds to the "Thank You"
21 page (resulting in a video that does not include the "Thank You" page).

22 21. Mr. Young's discussion of how the Jornaya software functioned on the
23 affordable-health-plans.org website has no bearing on how the Jornaya software
24 operated on the different and unrelated LMB.YourVASurvey.info website over 18
25 months ago. As to the operation of LMB.YourVASurvey.info in 2018, the available
26 technical evidence shows that the code for ActiveProspect to record the "Thank You"
27 page was not embedded on the "Thank You" page and that Ms. Hill, in fact, clicked
28 the "See my results!" button.

1 I declare under penalty of perjury that the foregoing is true and correct.
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3 Executed on May 14, 2020.

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5 PHILLIP GREENSPUN, Ph.D

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